LIM SENG GIN & ANOR. v. REG.

[A. Cr. J. (Spenser Wilkinson J.) October 25, 1955]

[Penang — Criminal Appeal No. 42 of 1955]

Criminal Procedure Code (Cap. 21), s. 57 — Power to require person to execute a bond with or without sureties for his appearance in Court — Discretion must be judicially exercised.

This was an appeal against an order made by the learned Magistrate under s. 57 of the Criminal Procedure Code, requiring the appellants to execute a bond for their appearance at the trial. The appellants had been summoned before the learned Magistrate on three charges relating to a public lottery.

Held: (1) the Magistrate can only exercise his discretion to make an order under s. 57 of the Criminal Procedure Code where there are reasons connected with the particular case for making the order; (2) as there were no such reasons in this case, the order must be set aside.

Cases referred to:—

(1) *Ritter v. Godfrey* (1920) 2 K.B. 47.

(2) *Donald Campbell & Co. v. Pollack* (1927) A.C. 732.

(3) *Civil Service Co-Operative Society v. General Steam Navigation Co.* (1903) 2 K.B. 756.

(4) *Kang Yeow Hooi v Public Prosecutor* (1954) M.L.J. 233.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Kheng Kooi for the appellants.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J. : — The appellants were charged with three charges relating to a public lottery and appeared before the Magistrate's Court in answer to a summons. The appellants having claimed trial the case was adjourned for hearing but before the adjournment the Prosecuting Officer applied to the Court to exercise its powers under section 57 of the Criminal Procedure Code and to order the two accused to be put on a bond in the sum of $500 each with one surety for their appearance at the trial. The Court made the order asked for and it was against this order that this appeal was brought.

The grounds upon which the application was made were that the offence was a serious one and the possibility that the accused might not turn up. Nothing was said by the Prosecuting Officer to indicate in what respect it was considered that the offence was a serious one in relation to other offences of the same kind nor was any statement of fact made or evidence adduced to suggest the probability that the accused would not appear at the continued hearing.

Section 57 of the Criminal Procedure Code reads as follows:—

"When any person for whose appearance or arrest any Court is empowered to issue a summons or warrant is present in such Court, it may require such person to execute a bond with or without sureties for his appearance in such Court."

I think there is no doubt that this section confers a discretion upon the Magistrate to require a person to execute a bond in a proper case and I agree with the learned Magistrate in thinking that the wording of the section is sufficiently wide to include accused persons.

There are many decided cases regarding the exercise of judicial discretion and as to the powers of appellate Courts to interfere with the exercise of such a discretion. Various kinds of discretion are dealt with by the authorities but the majority of these deal with costs. Even in those cases where costs are by statute left to the discretion of the Court an appellate Court will interfere if the discretion has been exercised on demonstrably wrong principles or if it has been exercised without any grounds. In the case of *Ritter v. Godfrey*[1] Lord Sterndale M.R. said:—

"The discretion must be judicially exercised and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial."

This sentence forms part of a passage quoted in the opinion of Lord Cave in *Donald Campbell & Co. v. Pollack*[2] (at page 809) and later in the same opinion Lord Cave says (at page 811):—

"My Lords, it appears to me that the true view is substantially that taken by Lord Sterndale in the above quoted passage in his judgment in **Ritter v. Godfrey**, although I would express it in somewhat different language."

A similar view was expressed by Lord Halsbury in *Civil Service Co-Operative Society v. General Steam Navigation Co.*[3] where he says:—

"But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied."

The fact that this is the first occasion, as far as I am aware, upon which the provisions of this particular section had been invoked would not, I think, be a good ground for interfering with the Magistrate's discretion if it had been exercised upon proper materials; but I think this fact lends support to my view that this section is intended to be used only where there are some circumstances in the case which differentiate it from the many hundreds of cases in which accused persons do in fact attend upon the date fixed for trial without being bonded.

Although it is true that the fine imposed in cases of this kind can be and often are very heavy the charges in the present case are not particularly serious in comparison with many cases which come within the Magistrate's jurisdiction. Indeed the Court of Appeal has referred to offences of this kind as being not *mala*

per se (*Kang Yeow Hooi v. Public Prosecutor*[4]). Moreover, although the offence (there is in fact only one although there are three charges) is punishable with twelve months' imprisonment in addition to a fine it is much more usual in these cases to impose a fine than imprisonment.

With regard to the suggestion that there was a possibility that the accused might not appear at their trial, I would observe that as a possibility this exists in every case.

I am of opinion that when section 57 of the Criminal Procedure Code is read in conjuction with the other provisions of the Code and in the light of the principles enunciated in the relevant authorities it becomes clear that there must be reasons connected with the particular case for making an order under the section and it is only when such reasons exist that the Magistrate can exercise a discretion as to whether or not in the circumstances an order should be made. There being in the present case nothing on the record to indicate that this was an unusually bad case of assisting in carrying on a public lottery and no reasons having been given by the prosecution for supposing that these particular accused might not appear at their trial it seemed to me that there was really no material upon which the learned Magistrate could exercise a discretion one way or the other.

For these reasons I allowed the appeal and set aside the learned Magistrate's order.

Appeal allowed.

REG. v. LIM CHENG TONG

[A. Cr. J. (Spenser Wilkinson J.) November 28, 1955]

[Penang — Criminal Appeal No. 52 of 1955]

Customs Ordinance 1952, ss. 119, 129 and 131 — Sentence — Quantum of fine — Default sentence of imprisonment should bear some relationship to the amount of the fine.

In this case the respondent was convicted on his plea of guilty on a charge of knowingly harbouring uncustomed goods, to wit, 12 gold bars of a total value of $14,500 an offence under s. 131 of the Customs Ordinance. The minimum fine which could be imposed under the section was a fine of $5,000 and the maximum was $43,500.

The learned President of the Sessions Court imposed a fine of $15,000 with 30 days' imprisonment in default. The Crown appealed against this sentence on the ground that the period of 30 days' imprisonment could not properly be regarded as satisfying the justice of the case and bore no relation to the maximum laid down by s. 119 of the Customs Ordinance, whereby the maximum period of imprisonment in default of payment of a fine is 3 years' imprisonment in respect of any fine from $1,600 upwards.

Held: (1) where as in this case a minimum fine is prescribed, the Court should as far as may reasonably be done in the circumstances of each case, tend to impose only the minimum fine in those cases where it is clear that the accused will be unable to pay even that amount; (2) where a fine is imposed the term of imprisonment in default should bear some relationship to the amount of the fine and there should be a reasonable proportion between the amount of the fine and the extent of the imprisonment in default; (3) in this case the sentence should be altered to a fine of $5,000 or nine months' imprisonment in default.

Case referred to :—

(1) *Public Prosecutor v. Sim Moh Ee* (1946) M.L.J. 88.

MAGISTRATE'S CRIMINAL APPEAL.

D. C. Jackson (Sr. Federal Counsel) for the Crown.

Respondent in person.

Spenser Wilkinson J. : — The respondent in this case was charged with two charges in respect of the smuggling of twelve gold bars of a total value of $14,500 into the Customs area of Butterworth. The first charge was laid under section 129(1)(e) of the Customs Ordinance, 1952 for failing to declare these gold bars; and the second charge was laid under section 131(1)(d) of the same Ordinance for knowingly harbouring uncustomed goods being the same gold bars. The accused pleaded guilty to both offences and there was no doubt upon the facts that this was a deliberate attempt to smuggle this large quantity of gold into the Customs area.

The learned President who tried the case convicted the accused on the second charge and stayed the trial on the first charge under section 180 of the Criminal Procedure Code. I am not prepared to say that the learned President was wrong in doing this but as it turned out it was perhaps unfortunate that he selected the second rather than the first charge upon which to convict, for it was only after he had convicted upon the second charge that he was made aware of the financial position and circumstances of the accused. It then appeared that the accused was a lorry driver earning $200 a month and supporting an aged mother, a wife and three young brothers. In those circumstances, even the minimum fine laid down by law under section 131 of the Customs Ordinance appears to be a severe fine and one which it is unlikely that the accused would be able to pay.

The learned President no doubt having in mind the large quantity of the gold in question and wishing to mark the seriousness of the offence with a view to deterring others imposed a fine of $15,000 with 30 days' imprisonment in default. Against this sentence the Crown appealed on the ground that the period of 30 days' imprisonment could not properly be regarded as satisfying the justice of the case and bore no relation to the maximum laid down by section 119 of the